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on INTEGRITY and EFFICIENCY



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Next Meeting:
December 8, 2009
10 am, GPO
Carl Hayden Rm

Survey Results on Proposed IG Whistleblower Protection Ombudsman Requirement

Last month, the Legislation Committee conducted a survey to assess the sense of the IG community regarding a requirement under S. 372, the Whistleblower Protection Enhancement Act of 2009, that IGs designate a Whistleblower Protection Ombudsman within their offices. The role of the Ombudsman is described in Sec. 120(a) of the Act, and would require that IGs:

“designate a Whistleblower Protection Ombudsman who shall advocate for the interests of agency employees or applicants who make protected disclosures of information; educate agency personnel about prohibitions on retaliation for protected disclosures; and advise agency employees, applicants, or former employees who have made or are contemplating making a protected disclosure.”

The Committee surveyed all 69 CIGIE members, and received substantive responses from 45 members, reflecting a 66% participation rate.

Overwhelming Support for Education Role

Of the IGs who responded, 95% believed that, under the IG Act, they have a duty to educate and inform agency employees about their role in preventing and investigating fraud, waste, and abuse, including an employee's whistleblower protections. Some IGs indicated they already conduct education and outreach on the issue to facilitate employee cooperation with IGs and to ensure an understanding of employee rights and protections with respect to making whistleblower complaints.

Significant Concern over “Advocacy and “Advise” Duties

While IGs support an educational role, 80% did not support the designation of an Ombudsman within their offices to “advocate” for employees who make protected disclosures or to “advise” these employees, applicants, or former employees. The primary concern was that such duties would be in conflict with IG Act tenets that OIGs perform independent and objective audits and investigations of an agency's programs and operations.

Additionally, some IGs were concerned that the new mandate would require OIGs to establish a “Chinese Wall” to keep the advisor/advocate role of the Ombudsman separate from the role of the OIG's independent investigators and auditors. Smaller IGs were thus particularly concerned that the new requirement would put a strain on already limited resources.

Office of Special Counsel or Senior Management Ombudsman Better Suited for Role

Over 60% of IGs suggested that an entity outside or within the agency other than the OIG would be better suited to assume the role of an Ombudsman. Forty-two percent of those suggested OSC as the appropriate outside entity to assume the advocacy and advise duties for Federal employees given its expertise in the area of whistleblower rights. As for an entity within the agency, the following were suggested in order of times mentioned: an agency-appointed independent Ombudsman at the senior management level; an agency ethics officer; or a human capital employee.

On November 10, the Committee sent letters to the Chairman and Ranking Member of the Senate Committee on Homeland Security and Government Affairs to communicate the survey results.

New Developments Regarding Testimonial Subpoena Authority for IGs

On October 20, Representative John Conyers (D-MI) introduced another piece of legislation that would provide new testimonial subpoena authority to IGs. [H.R. 3848](#), The Inspector General Authority Improvement Act, would amend the IG Act to provide authority to all IGs to subpoena testimony from former agency employees, former agency contractors, and former employees of agency contractors. The authority would be conditioned on a seven-day advance notification requirement to the Attorney General, who could then disallow issuance by providing a written justification. The authority would also require a transcription of all subpoenaed testimony.

H.R. 3848 is the latest in a series of pending and recently enacted legislation to provide testimonial subpoena authority to IGs. On October 28, the President signed into law the [National Defense Authorization Act for FY 2010 \(NDAA\)](#). Section 1042 of the NDAA provides the DOD IG with authority to subpoena “the attendance and testimony of witnesses in the performance of functions assigned to the Inspector General” under the IG Act. In addition, DOD IG must provide notification to the Attorney General seven days prior to issuing a subpoena, but unlike H.R. 3848, the Attorney General cannot disallow its issuance and there is no transcription requirement.

A third authority contained in [S. 1354](#), which would provide the IGs of five financial regulatory agencies (FRB, CFTC, NCUA, PBGC, and SEC) with testimonial subpoena authority without Attorney General notification. However, the authority is limited to reach only “any officer or employee of a contractor or grantee of the establishment, or subcontractor or subgrantee of such a contractor or grantee, or any person or entity regulated by the establishment.”

On October 14, five representatives from the Legislation Committee met with senior officials at DOJ’s Criminal Justice Division to share the results of the Committee’s recent survey of the IG community regarding testimonial subpoena authority and to argue for a consistent authority across all IGs. The Committee will next meet with DOJ’s Civil Fraud Division to discuss drafting CIGIE-sponsored guidelines on testimonial subpoena authority in consultation with DOJ. The Committee has also communicated with staff on the Senate Homeland Security and Government Affairs and the House Oversight and Government Reform Committees about its recent efforts regarding testimonial subpoena authority.

Updates on Pending Legislation

[S. 1490 – The Personal Privacy and Security Act of 2009](#)- The bill, sponsored by Patrick Leahy (D-VT), was voted out of committee favorably with no amendments. The purpose of the bill is to prevent and mitigate identity theft, protect personally identifiable information (PII), and establish breach notification procedures. Many of its provisions, particularly those related to notification and enforcement, are identical to those contained in [S. 139, The Data Breach Notification Act of 2009](#). On July 10, we sent letters based on CIGIE survey results to S. 139’s sponsor, Sen. Feinstein (D-CA), as well as to Judiciary Chairman Leahy (D-VT) and to Ranking Member Sessions (R-AL). The Committee will send a similar letter to Chairman Leahy on S. 1490.

If you want more information about other IG-related legislation, please click [here](#).